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Minimum prices for alcoholic beverages-a good opportunity for a fresh look at resale price maintenance?

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And they really are going to do it!

<http://www.bbc.co.uk/news/uk-scotland-18052849>

As had been announced, the SNP led Scottish executive is indeed going to push forward in introducing a minimum price per unit of alcohol. This measure, which has been championed by the Health Secretary and deputy leader Ms Sturgeon (http://www.scottish.parliament.uk/S4_Bills/Alcohol%20%28Minimum%20Pricing%29%20%28Scotland%29%20Bill/Bill_as_introduced.pdf), represents one of the flagship policy goals of the SNP agenda. Its justifications are to be found in great concerns as to the rise of binge-drinking, alcohol related hospital admissions as well as long-term health problems associated with high consumption of alcohol. These problems have been regarded as strongly linked with the availability of beer, wine and (perhaps more worryingly) strong cider at low prices especially in supermarkets.

Giving evidence before Holyrood's Health and Sport Committee at the beginning of 2012 (see: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6852&i=62104&c=1284513>), Prof John Brennan of Sheffield University's Alcohol Research Group, pointed out that if "(...) we change the prices (...) the baseline consumption changes to a new level of consumption for each drinker group (...)." The Alcohol Research Group study showed that "(...)if we put prices up, consumption falls to whatever degree the modelling says (...)". The study further showed the causal link existing between "consumption and harms", the latter characterised in terms of mortality and illness associated with consumption (both chronic and acute) and also sickness absence; it was illustrated that, given the risk function existing between consumption and harm to health, as a result of which "(...) if consumption is higher, the risk of various health harms is higher (...)", adopting measures capable of affecting the consumption patterns had a direct impact on the level of harm. On that basis, Prof Brennan expressed the view that the fall in consumption caused by a price rise had a direct impact on the health problems that were directly related to alcohol consumption.

In the same hearing, Prof. Jonathan Chick, of Queen Margaret University, further noted that, while demand for alcohol, especially by heavy drinkers, seemed to remain inelastic when price rises were owed to taxation, due to the ability of buyers to "trade down" to cheaper beverages, it was appreciably more elastic to changes instigated by minimum prices, because the latter prevented "trading down" from occurring.

The Executive's proposals were clearly influenced by the admittedly convincing and solid evidence provided by the Sheffield Alcohol Research Group Study (see: http://www.shef.ac.uk/mediacentre/2012/minimum_alcohol_pricing_update.html). Nonetheless, as is well known, criticism abounded, ranging from claims that "sensible drinkers" would be adversely affected to allegations that the proposed legislation could penalise "lower income groups". However, it is readily apparent that since the Bill was introduced, the tide seems to be turning, with the Liberal democrats and the Conservatives supporting the Bill and Labour abstaining last March.

So far so good then? Surely, one cannot but regard this Bill as a courageous stance on the part of the Executive in

attempting to tackle the health harms and social costs arising from excessive alcohol consumption: when the Bill eventually makes it on the statute books, none of the "rock bottom price" deals offers available so far in supermarkets and off licence outlets will be any longer possible. However, the Executive's move brings back to the fore a much discussed issue for competition lawyers-namely, the extent to which resale price maintenance, in this case imposed by state action, can be reconciled with competition law principles.

Resale price maintenance has been seen for a long time as a serious infringement of the EU competition rules; according to the Court of Justice of the EU in *SA Binon* (case 243/83, [1985] ECR 2015, para. 43-45) even in markets where "special products" were traded (in that case, magazines and newspapers) and which therefore justified the existence of, inter alia, selective distribution systems, any form of "price fixing agreement", whether horizontal or vertical, represented a 'by object' restriction of competition. The Court emphasised that these types of arrangements would therefore be void unless it could be established that they complied with the four conditions of Article 101(3) TFEU. A similarly hardline approach was also adopted for a long time in the US: in 1911 the US Supreme Court held in *Dr Miles* (220 US 373) that these arrangements should be found to be illegal regardless of their economic justification. This precedent was famously overruled at Federal level by the same Court in *Leegin* in 2007 (551 US 877), on the ground that this type of clause can, despite limiting the freedom of the retailers to set their prices, have pro-competitive effects, ranging from encouraging the retailers to invest in their operations to boosting inter-brand competition; they could also be used as a means to encouraging the provision of additional services that retailers may not feel able to provide due to the risk of free riding. Although the judgment has been met with resistance by several states and their courts, leading sometimes to the enactment of "Leegin-repealer" statutes, it is undeniable that this judgment raises a number of questions for EU competition lawyers as well: could any justification be found for setting minimum prices? And if that is the case, what could these justifications be?

In *Binon* the Court of Justice itself accepted that the legal exception's four conditions could provide a forum within which any supposed "beneficial" effects of a resale price maintenance agreement could be assessed, with a view for it to "escape" the sanction of nullity provided in its paragraph 2. However, given the scrupulous nature of the approach adopted in the interpretation of the legal exception clause itself in the context of "per se" allegations, it may be wondered whether even convincing and well-founded justifications, such as those provided in the course of the debate on the Scottish Alcohol Bill, could pass muster under Article 101(3) TFEU. In this respect, it should be emphasised that unlike in *Binon*, any distribution agreement incorporating the minimum price per unit would only affect off licence sales of alcohol and not impact on sales occurring on the premises (such as the sale of drinks in pubs and restaurants and other establishments licensed for on-premise consumption); it should also be reminded that the parties would be obliged to insert the minimum price clause as a result of a legislative command. On this point, it should be emphasised, however, that "state compulsion" does not exonerate from competition law liability and that, perhaps most importantly, the domestic authorities faced with appraising the legality of similar arrangements are called upon to set aside legislation conflicting with the EU competition rules (see e.g. case 198/01, *Consorzio Italiano Fiammiferi v AGCM*, [2003] ECR I-8055).

Against this background, a question emerges as to the extent to which the Scottish legislation setting a minimum price may be faced with a "CIF type" scenario: in other words, would a domestic court, for instance, have to "set aside" the legislation and consequently declare an arrangement seeking to enforce the minimum price void? Or could it be claimed that the legal exception clause provides these agreements with a "safe harbour" on the ground that the health benefits arising from them (and which have been convincingly expounded for instance by the "Sheffield Report") are such as to countenance negative consequences for price competition, in accordance with the four conditions of Article 101(3) TFEU?

It is clear from the Court of Justice's case law that price competition is so important that it cannot be completely eliminated; at the same time, however, the court has repeatedly recognised that rivalry based on other

parameters, such as quality, is equally worth protecting and fostering-hence its approval of selective distribution systems, franchising and other rather "straitjacketing" (especially for retailers) forms of vertical arrangements. Could a similar argument be made for retail agreements concerning the supply of alcohol off-the-premises? The risks related to alcohol consumption, especially in significant and potentially hazardous quantities, has been well-documented; it is also clear that "non-economic goals", such as inter alia, environment and health protection were regarded as "plausible" grounds for the application of the legal exception in the past, both by the Commission and by the EU Courts, especially to the extent that these "non-economic benefits" could be "subsumed" in economic gains. As the Sheffield study shows, it could be argued that a reduction of harm to health arising from decreased alcohol consumption is liable to have positive consequences for the economy at large-measured in terms of, for instance, less sick days for patients and consequently of increased productive efficiency on workplaces. It is also suggested that, seen in this light, these benefits would be immediately and tangibly passed on to consumers, who would be able to take advantage from, inter alia, a reduction in alcohol related crime and, to some degree, of other positive consequences, such as a reduction of hospital waiting times arising from resources freed up by the decreased alcohol related hospital admissions.

However, whether the agreements in question would pass muster also vis-a-vis the "negative conditions of Article 101(3) is a more complex issue. It is acknowledged that the obligation to abide by a minimum price is limited in its scope-in as much as it only applies to "off licence" sales-and in time (the Act, if it comes into effect, will be reviewed in 6 years). However, to ensure that this obligation is "indispensable", i.e. strictly necessary and proportionate to the realisation of its beneficial effects will be a complex knot to untie. In this respect, it is respectfully suggested that the evidence provided in the Sheffield study as to the beneficial knock on effects of a minimum price is rather solid and convincing, thus supporting the view that a minimum price, especially as far as "hazardous drinkers" are concerned, is the only way forward to securing concrete reduction of the harm arising from excessive alcohol consumption; it is added that setting a minimum price of 50p/unit would seem to be proportionate in the face of the size of these positive effects-according to the Sheffield study, the minimum price could deliver up to a total of £64million in harm reduction after one year and up to £942m after 10 years. However, the "non-elimination-of-significant-competition" condition would admittedly be more problematic to meet: the obligation to abide by the minimum price would affect the whole off-license sale segment without exception, and touch upon the "price competition" dogma identified by the Court of Justice itself. Surely, the circumstance that the Act is likely to be subjected to a "sunset clause" would be a relevant factor in this assessment; it is also beyond doubt that suppliers would be free to compete on the basis of non-price parameters and could even be in a position of "reinvesting" any extra margin in pro-competitive, quality enhancing initiatives.

In conclusion, it is respectfully suggested that any allegations that the Scottish measures envisaged in the Alcohol Bill would be contrary to EU competition law seem less strong than it would seem at first glance: it is argued that a careful consideration of individual sales arrangements and of pricing practices in light of the legal exception could resort to reconciling the interests of genuine competition and of "good", rivalrous business with those of implementing important policy goals, such as the protection of health and well-being of consumers in Scotland (and beyond? The Westminster coalition Government is proposing a 40p minimum price per unit of alcohol). The Alcohol Bill, in substance, seems to be raising once again the long-standing question of "what competition is for" and what we mean by "consumer welfare": if we take the latter as our end-goal for the application of the competition rules, it is hard to see why improving public health and thereby securing the benefits that come with it, especially for the economy at large, is not worth pursuing-even at the price of a reduction (whose magnitude is yet to be assessed) of price competition.

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